SUPREME COURT, U.S.
FILED

No. 09-288

In the Supreme Court of the United States

PUGET SOUND ENERGY, INC., ET AL., PETITIONERS

v.

STATE OF CALIFORNIA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL ENERGY REGULATORY COMMISSION IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals had jurisdiction to review a proceeding to investigate the reasonableness of rates for electric energy under 16 U.S.C. 824e, in which the Federal Energy Regulatory Commission held an evidentiary hearing, took recommendations from an administrative law judge, held oral argument, and issued orders denying refunds.

2. Whether the court of appeals erred in failing to defer to the Federal Energy Regulatory Commission's decision to address various issues arising from the California energy crisis by conducting separate supplier-specific enforcement proceedings under 16 U.S.C. 825h, rather than reopening a generic refund proceeding under 16 U.S.C. 824e.

3. Whether the court of appeals erred in failing to defer to the Federal Energy Regulatory Commission's interpretation of the scope of a complaint.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 2
Argument 8
Conclusion 17

TABLE OF AUTHORITIES

Cases:

Amerada Hess Pipeline Corp. v. *FERC*, 117 F.3d 596 (D.C. Cir. 1997) 16

American Elec. Power Serv. Corp., 103 F.E.R.C. ¶ 61,345 (2003) 5, 13

Association of Irritated Residents v. *EPA*, 494 F.2d 1027 (D.C. Cir. 2007) 10

Baltimore Gas & Elec. Co. v. *FERC*, 252 F.3d 456 (D.C. Cir. 2001) 11

Burlington N. R.R. v. *ICC*, 985 F.2d 589 (D.C. Cir. 1993) 16

California ex rel. Lockyer v. *FERC*, 383 F.3d 1006 (9th Cir. 2004), cert. denied, 551 U.S. 1140 (2007) 3

CAlifornians for Renewable Energy v. *California Pub. Utils. Comm'n*, 119 F.E.R.C. ¶ 61,058 (2007) 9

Colorado Office of Consumer Counsel v. *FERC*, 490 F.3d 954 (D.C. Cir. 2007), cert. denied, 128 S. Ct. 1872 (2008) 14, 16

Enron Power Mktg., Inc., 103 F.E.R.C. ¶ 61,346 (2003) 5, 13

GTE Serv. Corp. v. *FCC*, 782 F.2d 263 (D.C. Cir. 1986) .. 12

Greer v. *Chao*, 492 F.3d 962 (8th Cir. 2007) 11

Cases—Continued: Page

Hamilton-Brown Shoe Co. v. *Wolf Bros. & Co.*, 240 U.S. 251 (1916) 14
Heckler v. *Chaney*, 470 U.S. 821 (1985) 6, 9, 10
Mobil Oil Exploration & Producing S.E., Inc. v. *United Distrib. Cos.*, 498 U.S. 211 (1991) 12, 14
Morgan Stanley Capital Group Inc. v. *Public Util. Dist. No. 1*, 128 S. Ct. 2733 (2008) 3
New York State Dep't of Law v. *FCC*, 984 F.2d 1209 (D.C. Cir. 1993) 11
Public Utils. Comm'n v. *FERC*, 462 F.3d 1027 (9th Cir. 2006) 15
San Diego Gas & Elec. Co. v. *Sellers of Energy & Ancillary Servs.*, 95 F.E.R.C. ¶ 61,418 (2001) 3
San Diego Gas & Elec. Co. v. *Sellers of Energy & Ancillary Servs.*, 93 F.E.R.C. ¶ 61,294 (2000) 3
SEC v. *Chenery Corp.*, 318 U.S. 80 (1943) 14
Sherman v. *Black*, 315 Fed. Appx. 347 (2d Cir. 2009) 11
Sierra Club v. *Larson*, 882 F.2d 128 (4th Cir. 1989) 11
Vermont Yankee Nuclear Power Corp. v. *NRDC*, 435 U.S. 519 (1978) 12

Statutes and rule:

Administrative Procedure Act, 5 U.S.C. 706 6
Federal Power Act, 16 U.S.C. 791a *et seq.* 2
16 U.S.C. 824(b)(1) 2
16 U.S.C. 824d(a) 2
16 U.S.C. 824d(b) 2
16 U.S.C. 824e 2, 4, 10, 12, 13, 14

Statutes and rule—Continued: Page

16 U.S.C. 824e(a) 2, 13
16 U.S.C. 824e(b) (2000) 2
16 U.S.C. 825h 2, 3,13
Sup. Ct. R. 10 14

Miscellaneous:

FERC Report to Congress, *The Commission's Response to the California Electricity Crisis and Timeline for Distributions of Refunds* (Dec. 27, 2005) <http://www.ferc.gov /legal/staff-reports/comm-response.pdf> 5, 6
Investigation of Terms & Conditions of Pub. Util. Market-Based Rate Authorizations, 103 F.E.R.C. ¶ 61,349 (2003) 13
Investigation of Anomalous Bidding Behavior & Practices, 103 F.E.R.C. ¶ 61,347 (2003) 13

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-37a) is reported at 499 F.3d 1016. The orders of the Federal Energy Regulatory Commission (Pet. App. 378a-408a, 409a-447a, 448a-453a) are reported at 103 F.E.R.C. ¶ 61,348, 105 F.E.R.C. ¶ 61,183, and 106 F.E.R.C. ¶ 61,109.

JURISDICTION

The judgment of the court of appeals was entered on August 24, 2007. The petitions for rehearing were denied on April 9, 2009 (Pet. App. 454a). On June 29, 2009, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including Sep-

tember 4, 2009, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Federal Power Act (FPA or Act), 16 U.S.C. 791a *et seq.*, grants the Federal Energy Regulatory Commission (FERC or Commission) exclusive jurisdiction over the "transmission of electric energy in interstate commerce" and the "sale of electric energy at wholesale in interstate commerce" by public utilities. 16 U.S.C. 824(b)(1). Under the FPA, proposed rates for the sale or transmission of power within FERC's jurisdiction must be "just and reasonable" and not unduly discriminatory or preferential. 16 U.S.C. 824d(a) and (b).

The Act also provides for the Commission to review rates after they have been accepted for filing and gone into effect. If, after a hearing—either on its own motion or based on a complaint –the Commission determines that any existing rate or charge is "unjust, unreasonable, unduly discriminatory or preferential," it must determine and fix by order "the just and reasonable rate * * * to be thereafter observed and in force." 16 U.S.C. 824e(a). The relief allowed under 16 U.S.C. 824e is temporally limited: FERC may order refunds only for rates collected after the "refund effective date"; during the period at issue in this case, that date could be set no earlier than 60 days after the filing of a complaint. 16 U.S.C. 824e(b) (2000).

Under 16 U.S.C. 825h, the Commission also has authority to remedy tariff violations through enforcement proceedings. Section 825h grants the Commission "power to perform any and all acts, and to prescribe,

issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this [Act]." 16 U.S.C. 825h. The Commission may use its authority under Section 825h to require disgorgement or other remedies if a seller is found to have violated the terms of its rate authority, or rules or orders of the Commission.

2. This case arises out of the 2000-2001 energy crisis in the western United States. See generally *Morgan Stanley Capital Group Inc.* v. *Public Util. Dist. No. 1*, 128 S. Ct. 2733 (2008); *California ex rel. Lockyer* v. *FERC*, 383 F.3d 1006 (9th Cir. 2004), cert. denied, 551 U.S. 1140 (2007). During the western energy crisis, the price of electricity in the Pacific Northwest rose dramatically. Pet. App. 9a. In October 2000, petitioner Puget Sound Energy, Inc. (Puget) filed a complaint with the Commission, seeking an order limiting the prices at which sellers subject to FERC's jurisdiction could sell electricity into the Pacific Northwest's wholesale power markets. *Id.* at 10a-11a. On December 15, 2000, the Commission dismissed the complaint. *Id.* at 11a; *San Diego Gas & Elec. Co.* v. *Sellers of Energy & Ancillary Servs.*, 93 F.E.R.C. ¶ 61,294. The Commission explained that implementation of the "region-wide price cap" sought by Puget would be "impracticable given the market structure in the Northwest." *Id.* at 62,019.

Puget sought rehearing before the Commission. While its request was pending, the Commission imposed price caps on all sales in all western spot markets. *San Diego Gas & Elec. Co.* v. *Sellers of Energy & Ancillary Serv.*, 95 F.E.R.C. ¶ 61,418 (2001). Following that decision, Puget moved to withdraw both its complaint and its request for rehearing of the December 15, 2000 order

dismissing its complaint. Various parties opposed the withdrawal motion. Pet. App. 11a-12a.

In July 2001, acting on its own initiative, the Commission instituted a separate proceeding to consider past spot-market sales in the Pacific Northwest. Pet. App. 38a-110a. The Commission did not invoke 16 U.S.C. 824e to determine whether to change the rates on file. Instead, it explained that the "preliminary evidentiary proceeding" was "intended to facilitate development of a factual record on whether there may have been unjust and unreasonable charges for spot market bilateral sales in the Pacific Northwest for the period beginning December 25, 2000 through June 20, 2001," with the aim of "determin[ing] the extent to which the dysfunctions in the California markets may have affected decisions in the Pacific Northwest." Pet. App. 102a-103a.

After discovery and an evidentiary hearing, an administrative law judge (ALJ) recommended against ordering refunds for such sales. Pet. App. 326a. The evidence demonstrated that the Pacific Northwest market for spot sales of electricity was competitive and functional during the relevant time period and that prices were not unreasonable. *Ibid.* While California electric energy prices affected electric energy prices in the Pacific Northwest, other factors contributed to higher prices in the Pacific Northwest, including reduced hydroelectric power due to drought, increased demand, and high natural-gas prices. *Id.* at 322a. The ALJ also recommended that the Commission affirm its dismissal of Puget's complaint and allow Puget to withdraw its rehearing request. *Id.* at 365a.

3. In June 2003, the Commission denied Puget's motion to withdraw its complaint and granted its request

for rehearing of the December 2000 dismissal of its complaint. The Commission reiterated that it had provided all the relief sought by Puget in its complaint when the Commission implemented price caps on wholesale spot-market sales throughout the West. Pet. App. 387a-390a. Based on an examination of the "totality of the circumstances," the Commission also determined that even if it were to conclude that prices during the potential refund period were unjust and unreasonable, "the directing of refunds in this proceeding would not result in an equitable resolution of the matter." *Id.* at 401a-402a. Accordingly, the Commission terminated the proceeding.

On the same day, the Commission initiated enforcement proceedings relating to Enron's market-manipulation strategies, which had come to light the year before. *American Elec. Power Serv. Corp.*, 103 F.E.R.C. ¶ 61,345 (2003); *Enron Power Mktg., Inc.*, 103 F.E.R.C. ¶ 61,346 (2003). The Commission directed dozens of entities, including several Pacific Northwest sellers, to show cause why their conduct did not constitute market manipulation in violation of applicable tariffs. *American Elec. Power Serv. Corp., supra.* It further directed agency ALJs to recommend appropriate remedies for any unjust enrichment by those entities. 103 F.E.R.C. at 62,328. And it instituted another evidentiary proceeding to address allegations that another set of sellers engaged in gaming or other market-manipulation practices in concert with other market participants. *Enron Power Mktg., Inc., supra.*[1]

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[1] By 2005, the Commission had "completed all but one of the 60 investigations regarding market manipulation" that were instituted in these orders. FERC Report to Congress, *The Commission's Response to the California Electricity Crisis and Timeline for Distributions of*

4. The Commission later denied a request for rehearing of its decision not to award refunds for sales in the Pacific Northwest. Pet. App. 409a-447a. In a separate order, it denied a rehearing request filed by California and some of its agencies. *Id.* at 448a-453a. The Commission clarified that bilateral transactions involving the California Energy Resources Scheduling Division (CERS) of the California Department of Water Resources were outside the scope of the Pacific Northwest proceeding. The Commission agreed with the ALJ that Puget's complaint concerned only wholesale power sales into the Pacific Northwest and that the evidence showed that the CERS transactions served only California load, not Pacific Northwest load. *Id.* at 452a-453a.

5. The court of appeals granted petitions for review. Pet. App. 1a-37a. The court rejected the Commission's argument that its decision to deny refunds was an exercise of unreviewable agency discretion under *Heckler* v. *Chaney*, 470 U.S. 821, 831 (1985), holding that *Heckler* is limited to "agency *refusals to institute* investigative or enforcement proceedings." Pet. App. 18a (quoting *Heckler*, 470 U.S. at 838). But where an agency has initiated proceedings, the court reasoned, there are meaningful standards for review and *Heckler* does not apply. Thus, the court continued, "where FERC has made a determination to adjudicate a dispute or take steps towards enforcing a violation of the law," the outcome it chooses is subject to review under the standards set forth in the Administrative Procedure Act, 5 U.S.C. 706. Pet. App. 18a. Here, because "FERC has held hearings and taken evidence to adjudicate a dispute between the

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Refunds 3 (Dec. 27, 2005) <http://www.ferc.gov/legal/staff-reports/comm-response.pdf>.

parties as to whether refunds should be awarded" in the Pacific Northwest, the court held that the agency's decision was reviewable under the same standards that govern review of other grants or denials of refunds. *Id.* at 18a-19a.

The court of appeals rejected FERC's determination that CERS purchases in the Pacific Northwest spot market were outside the scope of the proceeding because Puget's complaint focused on sales of energy "into" the Pacific Northwest, whereas purchases made by CERS were sales "into" California. Pet. App. 29a-30a. The court concluded that substantial evidence in the record did not support the finding that energy purchased by CERS was physically delivered in California, and, in any event, the legal change of ownership occurred at interconnections located within the Pacific Northwest. *Id.* at 30a-31a. Further, although the court was "mindful" that it owed deference to FERC's interpretation of the complaint, the court nonetheless rejected FERC's interpretation because "[o]n its face, Puget's complaint provides no indication of an intent to exclude refunds for energy purchased in the Pacific Northwest spot market for consumption outside the geographical area." *Id.* at 31a. The court further concluded that FERC's interpretation of Puget's complaint was inconsistent with its interpretation of a similar complaint in the California refund proceeding. *Id.* at 32a.

The court of appeals also held that FERC had erred in failing to take into account evidence of market manipulation when it decided not to order refunds. Pet. App. 33a-36a. In particular, the court determined that FERC was required to reconsider the finding that the Pacific Northwest market was functional and competitive in light of the evidence adduced concerning manipulative

schemes in the California market involving Pacific Northwest sellers. *Id.* at 34a-35a. That evidence of market manipulation had led FERC to initiate separate enforcement proceedings in 2003. See p. 5, *supra*. The court of appeals rejected the argument that the need for reconsideration in these refund proceedings was obviated by FERC's decision to address market manipulation in the separate enforcement proceedings. Pet. App. 35a-36a. The court noted that the Commission had failed to rely on that rationale in its order, and, in any event, "FERC's prosecutorial investigations cannot justify the denial of relief in contested adjudications before the Commission." *Id.* at 36a. Accordingly, the court "remand[ed] to permit FERC to examine this new evidence of market manipulation in detail and account for it in any future orders regarding the award or denial of refunds in the Pacific Northwest proceeding." *Ibid.*

ARGUMENT

Petitioners argue (Pet. 12-23) that the court of appeals was precluded from reviewing the FERC order at issue in this case, which, they say, represented a discretionary decision not to initiate enforcement proceedings. The court of appeals reasonably concluded otherwise in the particular circumstances of this case, however, and its conclusion does not warrant review by this Court. The court of appeals reasoned that the Commission's decision in this case, reached after formal adversarial proceedings—including an evidentiary hearing—was subject to judicial review. Petitioners also object (Pet. 23-32) to several rulings by the court of appeals on procedural issues in the case concerning the scope of the refund proceedings and the discretion of the Commission to choose the manner in which it will pursue allega-

tions of violations. We agree that the court of appeals erred on those points. But those errors consist of the misapplication of correctly stated legal principles to the particular circumstances of this case, which arises out of the 2000-2001 western energy crisis, a highly unusual event that is unlikely to recur. See *CAlifornians for Renewable Energy* v. *California Pub. Utils. Comm'n*, 119 F.E.R.C. ¶ 61,058, at ¶ 30 (2007) (noting that "the 2000-2001 energy crisis in the West" was "an unprecedented situation in which numerous adverse events occurred simultaneously"); *id.* ¶¶ 31-41 (describing steps taken by the Commission "to ensure that there are appropriate market safeguards in place to prevent a repeat of the California 2000-2001 energy crisis"). Moreover, the court of appeals remanded for further proceedings and explanation by the Commission, and did not decide that refunds would be appropriate. Further review therefore is not warranted.

1. Petitioners contend (Pet. 12-23) that FERC's order in this case was not subject to judicial review. They rely on *Heckler* v. *Chaney*, 470 U.S. 821 (1985), which held that "an agency's decision not to prosecute or enforce, whether through civil or criminal process," is not subject to review. *Id.* at 831. Before the court of appeals, the Commission advanced a similar contention, arguing that its decision not to order refunds was analogous to a decision not to undertake enforcement action and therefore was immune from review under *Heckler*. Pet. App. 17a. But as the court of appeals observed, the Commission action at issue here can appropriately be characterized as an order resolving an adjudicatory proceeding rather than as a decision not to initiate enforcement proceedings. *Id.* at 18a. Here, the Commission ordered trial-type evidentiary hearings (with discovery,

testimony and cross-examination) before an ALJ, who presented findings and recommendations to the Commission, which later heard oral argument before issuing orders. *Id.* at 18a-19a. In this proceeding, unlike in a typical investigation related to enforcement proceedings, the Commission allowed affected persons to intervene and participate as parties in the trial-type evidentiary hearing. *Id.* at 50a-52a. The proceeding therefore had much in common with adjudicatory proceedings that usually are subject to judicial review, as distinguished from prosecutorial decisions that are not.

Significantly, moreover, as the court of appeals noted, the Commission did not simply decline to initiate an enforcement proceeding or a refund proceeding under 16 U.S.C. 824e; rather, it made a specific determination that refunds were not warranted in the Pacific Northwest. Pet. App. 18a-19a. And as the court of appeals also correctly noted, courts "regularly exercise judicial review over FERC's decision to grant or deny refunds." *Id.* at 19a. In any event, even if the court of appeals erred in its assessment of the agency's action in this somewhat unusual proceeding, that case-specific error would not warrant this Court's review.

Petitioners assert (Pet. 12-17) that the decision below conflicts not only with *Heckler* but also with various lower court decisions applying *Heckler*. But most of the cases relied on by petitioners involved agency actions that were indisputably prosecutorial or pre-enforcement actions. See, *e.g.*, *Heckler*, 470 U.S. at 824 (FDA refused to "take various [requested] investigatory and enforcement actions" or "recommend * * * prosecution" to address alleged statutory violations); *Association of Irritated Residents* v. *EPA*, 494 F.3d 1027, 1035 (D.C. Cir. 2007) (settlement of potential enforcement action by

consent agreement); *Greer* v. *Chao*, 492 F.3d 962, 963 (8th Cir. 2007) (agency investigated whether to take enforcement action against a government contractor and terminated the pre-enforcement action when the investigation was inconclusive as to violations); *Baltimore Gas & Elec. Co.* v. *FERC*, 252 F.3d 456, 457 (D.C. Cir. 2001) (FERC issued a "show cause" order and undertook a "non-public" enforcement investigation into violations of the Natural Gas Act, then settled the enforcement proceeding without resolving liability); *New York State Dep't of Law* v. *FCC*, 984 F.2d 1209, 1211-1212 (D.C. Cir. 1993) (on the basis of internal agency audits, FCC initiated an enforcement proceeding with a "show cause" order and terminated the proceeding on settlement, without resolving the legal issues); *Sherman* v. *Black*, 315 Fed. Appx. 347, 349 (2d Cir. 2009) (decision not to commence enforcement proceedings).

There are few, if any, analogous cases in which courts of appeals disclaimed authority to review formal agency orders that were preceded by the public, trial-type fact-finding proceeding that was conducted by the Commission in this case in response to the filing of a complaint. Petitioners point (Pet. 16) to *Sierra Club* v. *Larson*, 882 F.2d 128, 130-133 (4th Cir. 1989), which held that an agency's decision not to pursue "a formal penalty action" in response to a complaint was unreviewable, even though the agency had conducted a "fact-finding investigation," but there is no indication that the "investigation" in that case involved the kind of formal adversarial proceedings at issue here. Rather, the agency's decision appears to have been an ordinary exercise of prosecutorial discretion not to proceed with enforcement. This case therefore does not give rise to a conflict with the other decisions cited by petitioners,

which concerned judicial review of more traditional and typical prosecutorial decisions not to institute proceedings.

2. Petitioners are correct (Pet. 23-28) that the court of appeals erred in holding that the Commission was required to consider allegations of tariff violations in an adjudicatory rate proceeding initiated by a complaint under Section 824e, when the Commission was already addressing those allegations in an enforcement proceeding that it had initiated under 16 U.S.C. 825h. That aspect of the court's decision is contrary to *Mobil Oil Exploration & Producing Southeast, Inc.* v. *United Distribution Cos.*, 498 U.S. 211 (1991), which held that "[a]n agency enjoys broad discretion in determining how best to handle related, yet discrete issues in terms of procedures and priorities." *Id.* at 230 (citation omitted); see *ibid.* ("The court clearly overshot the mark if it ordered the Commission to resolve the take-or-pay problem in this proceeding," rather than "in a separate proceeding."); see also *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519, 543 (1978) ("Absent constitutional constraints or extremely compelling circumstances the administrative agencies should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties.") (internal quotation marks and citation omitted); *GTE Serv. Corp.* v. *FCC*, 782 F.2d 263, 273-274 (D.C. Cir. 1986).

When presented with evidence of market manipulation adduced by its staff and market participants, the Commission decided to consider that evidence in separate, supplier-specific enforcement investigative proceedings concerning possible tariff violations, rather than to reopen generic rate-changing refund proceed-

ings that had been underway for years. FERC issued a package of orders on the same day in which it established an enforcement structure for addressing the different types of allegations arising from the energy crisis: (1) it instituted new enforcement proceedings under Section 825h to investigate allegations of tariff violations by individual sellers, *American Elec. Power Serv. Corp.*, 103 F.E.R.C. ¶ 61,345 (2003), and *Enron Power Mktg., Inc.*, 103 F.E.R.C. ¶ 61,346 (2003), and those bidding into California's centralized market, *Investigation of Anomalous Bidding Behavior & Practices*, 103 F.E.R.C. ¶ 61,347 (2003); and (2) it ended the adjudicatory proceeding under Section 824e initiated by Puget's complaint to determine the reasonableness of rates in the Pacific Northwest, finding that prospective rates were appropriately mitigated and that no refunds were warranted, Pet. App. 378a-403a. The next day, the Commission completed issuance of the package of orders by imposing conditions on market-based rate authority in a Commission-initiated proceeding under Section 824e. *Investigation of Terms & Conditions of Pub. Util. Market-Based Rate Authorizations*, 103 F.E.R.C. ¶ 61,349 (2003).

Nothing in Section 824e compels the Commission to consider any and all issues in a single adjudicatory rate proceeding. To the contrary, the statute contemplates that such a proceeding may be limited to particular issues. Section 824e(a) provides that "[i]f, after review of any motion or complaint and answer, the Commission shall decide to hold a hearing, it shall fix by order the time and place of such hearing and shall specify the issues to be adjudicated." 16 U.S.C. 824e(a). As the D.C. Circuit has observed, in requiring that the Commission "specify the issues to be adjudicated," Section 824e

makes clear that these proceedings are designed to "identify and address such discrete issues." *Colorado Office of Consumer Counsel* v. *FERC*, 490 F.3d 954, 956 (2007), cert. denied, 128 S. Ct. 1872 (2008). Accordingly, in conducting a Commission-initiated investigation under Section 824e, the Commission was not required to adjudicate additional issues raised by parties. *Ibid.*; see *Mobil Oil*, 498 U.S. at 230.

Although the court of appeals erred in holding that the Commission was required to consider market-manipulation evidence in the Section 824e proceeding, that aspect of its decision does not warrant further review. The court rested its holding in part on its determination that the Commission had "fail[ed] to rely on this reasoning below," *i.e.*, that FERC had not explained, in its order, that consideration of market-manipulation evidence was unnecessary because that evidence was already being considered in a separate proceeding. Pet. App. 35a. The court's reasoning incorrectly assumes that the Commission has an obligation to explain the overall structure of its dockets in each order it issues. Nevertheless, the court proceeded from the fundamentally correct premise that an agency's decision may not be upheld on a ground on which the agency did not rely. See *SEC* v. *Chenery Corp.*, 318 U.S. 80, 88 (1943). The misapplication of that correctly stated rule of law to the particular set of orders at issue here does not warrant this Court's review. See Sup. Ct. R. 10. That is especially true in light of the interlocutory posture of this case, since the court remanded the case to the Commission but did not dictate what steps the Commission must take on remand and did not hold that refunds would ultimately be required. See *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916).

3. Finally, petitioners are correct (Pet. 28-32) that the court of appeals erred in construing Puget's complaint to include bilateral purchases in California, even though Puget—the party that drafted and filed the complaint—agreed with the Commission that its complaint concerning the Pacific Northwest did not address sales to California purchasers in that market. The court of appeals identified three reasons why FERC's determination that Puget's complaint did not encompass sales to California electricity users in the Pacific Northwest spot market was arbitrary and capricious.[2] First, the court defined the scope of the complaint by reference to what Puget did not explicitly *exclude*, rather than by reference to the violation it sought to remedy. Pet. App. 31a ("On its face, Puget's complaint provides no indication of an intent to exclude refunds for energy purchased in the Pacific Northwest spot market for consumption outside the geographical area."). Second, the court held that FERC should have interpreted the Puget complaint as it had interpreted another energy-crisis complaint requesting caps on bids into California's centralized energy market, as not "limiting refunds to entities that purchased energy for ultimate consumption in California." *Id.* at 32a. Third, the court emphasized that it had ruled in *Public Utilities Commission* v.

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[2] The court of appeals resolved this issue only after first concluding that FERC could not have found, on the record before it, that the CERS purchases occurred in California. Pet. App. 30a-31a. The court therefore concluded that it "must determine whether sales to CERS were outside the scope of the Pacific Northwest refund proceeding even if the legal change of ownership occurred in the Pacific Northwest." *Id.* at 31a. Petitioners do not seek review of this fact bound threshold ruling by the court of appeals. It presumably is open to FERC on remand to revisit that threshold issue.

FERC, 462 F.3d 1027, 1064 (9th Cir. 2006), that California transactions were outside the scope of that proceeding "based in substantial part on the existence of this proceeding involving the Pacific Northwest." Pet. App. 33a.

The court's reasoning does not withstand scrutiny. In construing a complaint, an agency must consider the entire context of the complaint and base its construction on each element of the complainant's theory of relief in order to determine the issues for adjudication. See *Burlington N. R.R.* v. *ICC*, 985 F.2d 589, 594 (D.C. Cir. 1993). The scope of a complaint should not be defined by what it fails expressly to exclude, nor must a complaint be interpreted on the basis of how a different complaint—brought by different complainants, involving different markets, and asserting different theories of relief—was interpreted in a different case. See *Colorado Office of Consumer Counsel*, 490 F.3d at 956. Finally, basing an interpretation of a complaint on whether a non-complaining party would have a remedy is not relevant to the task before an agency in construing a complaint's scope.

As petitioners appear to recognize, however, the proper interpretation of the complaint involved in this case is not an issue that warrants this Court's review. Instead, petitioners say (Pet. 28-32) that the decision below conflicts with decisions of other courts of appeals because the court of appeals failed to defer to the agency's reading of the complaint. But the court expressly acknowledged that it "owe[d] deference to FERC's interpretation of the scope of Puget's complaint," and it cited both *Burlington Northern*, *supra*, and *Amerada Hess Pipeline Corp.* v. *FERC*, 117 F.3d 596 (D.C. Cir. 1997), two of the cases on which petition-

ers rely in suggesting a conflict. Pet. App. 31a. Thus, the error of the court of appeals consists only in the misapplication of a correctly stated rule of law to the particular facts of this case, which is still at an interlocutory stage. That error does not warrant this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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